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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding no.	91249427
Party	Plaintiff Evolutionary Guidance Media R&D Inc.
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Date	12/27/2021
Attachments	EGM_MOTION_TO_STRIKE.pdf(167363 bytes)

BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

**EVOLUTIONARY GUIDANCE
MEDIA R&D INC.,**

Opposer,

v.

**CYBERMAN SECURITY, LLC AKA
THE CYBERHERO ADVENTURES:
DEFENDERS OF THE DIGITAL
UNIVERSE,**

Applicant.

Opposition No. 91249427

Serial No. 88219305

**Mark: THE CYBERHERO
ADVENTURES DEFENDERS OF THE
DIGITAL UNIVERSE**

Published: May 14, 2019

**OPPOSER EVOLUTIONARY GUIDANCE MEDIA R&D INC.'S,
MOTION TO STRIKE APPLICANT'S TRIAL BRIEF AND ATTACHED EXHIBITS**

Pursuant to TBMP Sections 539 and 801.05, Opposer Evolutionary Guidance Media R&D Inc. ("EGM" or "Opposer") hereby moves to strike all accompanying exhibits for Applicant Cyberman Security, LLC's ("Applicant") Trial Brief (16 TTABVUE) and any arguments made by Applicant that refer to the improperly submitted exhibits. Evidentiary material attached to a brief on the case cannot be given any consideration unless it was properly made of record during the Trial Period of the offering party. TBMP §§ 539 and 801.05. None of the exhibits filed with Applicant's brief were properly made of record during Applicant's Trial Period. As such, the evidence cannot be considered. EGM therefore respectfully requests that Applicant's exhibits to Applicant's Trial Brief be stricken.

ARGUMENT

Evidentiary material attached to a brief on the case can be given no consideration unless it was properly made of record during the Trial Period of the offering party. (TBMP §§ 539 & 801.05.) If evidentiary material not of record is attached to a brief on the case, an adverse party

may object thereto by motion to strike or otherwise. *Hole In 1 Drinks, Inc. v. Lajtay*, 2020 USPQ2d 10020, at *2 (TTAB 2020) (exhibits attached to brief not considered); *Syngenta Crop Protection, Inc. v. Bio-Chek, LLC*, 90 USPQ2d 1112, 1116 (TTAB 2009) (“Evidence submitted outside of the trial periods – including that attached to briefs – is untimely, and will not be considered.”) (quoting *Life Zone Inc. v. Middleman Group Inc.*, 87 USPQ2d 1953, 1955 (TTAB 2008)); *Lincoln National Corp. v. Anderson*, 110 USPQ2d 1271, 1274 n.5 (TTAB 2014) (evidence submitted for the first time with applicant’s trial brief not considered); *Plus Products v. Physicians Formula Cosmetics, Inc.*, 198 USPQ 111, 112 n.3 (TTAB 1978) (applicant’s exhibits attached to its brief cannot be considered); see also *Angelica Corp. v. Collins & Aikman Corp.*, 192 USPQ 387, 391 n.10 (TTAB 1976) (“Evidence submitted by opposer for the first time with its brief has not been considered because it was not regularly made of record during its testimony period in chief or rebuttal testimony period.”).

Applicant failed to submit any of the exhibits attached to the Trial Brief during the Trial Period. All four documents included as exhibits to Applicant’s Trial Brief were introduced to this matter for the first time with Applicant’s Trial Brief. It has long been established that a brief may not be used to introduce evidence and all exhibits should be submitted during the party’s trial period. ((TBMP §§ 532; TBMP § 704.05(b) [“A brief may not be used as a vehicle for the introduction of evidence.”])) For that reason, all Exhibits attached to Applicant’s brief in main should be stricken and should not be considered by the Board in ruling on this matter. (*Id.*; TBMP § 706; see also 37 C.F.R. § 2.123(k) (“Evidence not obtained and filed in compliance with these sections will not be considered.”)) As the exhibits are improper as evidence, the Board should also not consider any arguments in Applicant’s Trial Brief that are based on this Evidence. TBMP § 539 (“any portions of the brief that are found by the Board to be improper will be disregarded”).

CONCLUSION

Applicant's Trial Brief includes Exhibits that are not part of the evidentiary record in this matter. For this reason, Opposer therefore respectfully requests that the Board strike all associated Exhibits in their entirety to Applicant's Trial Brief and do not consider any of the evidence (or arguments based on such evidence) in reaching its decision in this matter.

Respectfully submitted,

WRIGHT LINDSEY & JENNINGS LLP



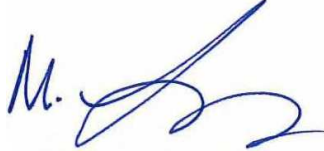
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Date: 12/27/2021

CERTIFICATE OF SERVICE

I hereby certify that on December 27, 2021, copies of this paper are being served upon the following by email:

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tad.prizant@rimonlaw.com
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A handwritten signature in blue ink, appearing to read 'M. Lowry', with a stylized flourish extending to the right.

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